Supreme Court, U.S.
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No. 99-1334

In The

Supreme Court of the United States

B. C. FOREMAN, IDA CLARK, OTIS TARVER, LOUIS DAVIS, AND MANDY PESINA,

Petitioners,

v.

DALLAS COUNTY, TEXAS; COMMISSIONERS COURT OF DALLAS COUNTY, TEXAS; LEE F. JACKSON, DALLAS COUNTY JUDGE; JIM JACKSON, JOHN WILEY PRICE, MIKE CANTRELL, AND KENNETH MAYFIELD, DALLAS COUNTY COMMISSIONERS; AND BRUCE SHERBET, ELECTIONS ADMINISTRATOR OF DALLAS COUNTY, TEXAS,

Respondents.

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The recitation of facts in the Fifth Circuit's opinion provides an objective and complete statement of the case, and Dallas County[1] believes it is an appropriate summary on which this Court can rely. The "Statement" in Foreman's[2] petition is generally accurate; however, some correction and amplification is necessary.

First, Foreman speaks of the plaintiffs' goal "to force [Dallas County] to adopt a racially and ethnically nondiscriminatory . . . method [of appointing election judges]" and claims that attainment of this goal entitles him to attorneys' fees. Pet. at 4; *see also* Pet. at 2, 5. While Foreman's personal goal may have been to have Dallas County adopt a new procedure for appointing election judges, that is not what he sought in his lawsuit and is nowhere reflected in the record. As the Fifth Circuit stated, this alleged goal was "relief which was never demanded, or even made clear, in the plaintiff's complaint." Pet. App. at 12a.

Second, Foreman claims to have prevailed in 1997 when this Court determined that the case had been improperly dismissed and then remanded for the district court to address the merits. Pet. at 5. The case, however,

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[1] Defendants/Respondents Dallas County, the Commissioners Court of Dallas County, the five members of the commissioners court, and the Dallas County Elections Administrator will be referred to collectively as "Dallas County."

[2] Petitioners/Plaintiffs B. C. Foreman and four other individuals will be referred to collectively as "Foreman."

became moot before the three-judge district court could rule on the merits.[3]

When the district court considered Foreman's request for an award of attorneys' fees, it relied on *Hewitt v. Helms*, 482 U.S. 755, 760 (1987), and held that this Court's interlocutory ruling did not confer prevailing party status on Foreman. Pet. App. at 40a. Foreman did not challenge that adverse finding by cross-appeal in the Fifth Circuit. As a result, any claim based on alleged success in the 1997 interlocutory appeal was not presented to the Fifth Circuit and is not before this Court.

REASONS FOR DENYING THE WRIT

I. The Primary Question on Which Foreman Asks the Court to Grant Certiorari Is Not Presented in this Case.

Foreman urges the Court to grant certiorari to resolve whether *Farrar v. Hobby*, 506 U.S. 103 (1992), repudiated the catalyst theory for purposes of awarding attorneys' fees to prevailing civil rights plaintiffs. *See* Pet. ("Questions Presented"). That question, however, is not presented in this case.

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[3] The district court dismissed the case "in part as moot and in part on the merits." *Foreman v. Dallas County*, 990 F. Supp. 505, 515 (N.D. Tex. 1998) (three-judge court). The court determined that the case was moot except for the plaintiffs' claim for lost election fees totaling $207. It then determined it had no authority to award lost election fees and dismissed that portion of the suit on the merits.

A. Foreman prevailed in the Fifth Circuit on the issue of the catalyst doctrine's viability post-*Farrar*. There is no adverse ruling for this Court to review.

Consistent with the majority of circuits, the Fifth Circuit assumed the continued vitality of the catalyst theory post-*Farrar*. Pet. App. at 10a. The court simply held that the *Foreman* plaintiffs failed to prove that they were prevailing parties under established catalyst theory standards. *See id.* ("Assuming, without deciding, that the catalyst theory still applies in this Circuit, the facts of this case do not support a finding that plaintiffs were prevailing parties under 42 U.S.C. § 1973*l*(e)."). Far from rendering an opinion that "squarely conflicts with rulings of most other circuits," as Foreman would have this Court believe, Pet. at 14, the Fifth Circuit aligned itself with the majority of circuits that recognize the catalyst theory as a viable measure of prevailing party status. In other words, Foreman *prevailed* on this threshold legal issue in the Fifth Circuit. Because Foreman suffered no adverse ruling, the issue is not presented for review. Anything the Court could write on the issue would be dicta.

The Fifth Circuit neither caused, nor exacerbated, a circuit split on the question of whether the catalyst theory remains viable post-*Farrar*. The Fourth Circuit remains the only Circuit to have held that the catalyst theory no longer exists. *See S-1 & S-2 v. State Bd. of Educ.*, 21 F.3d 49, 51 (4th Cir.) (en banc). This Court denied certiorari in that case. *See S-1 & S-2 v. State Bd. of Educ.*, 513 U.S. 876 (1994).

Recently, this Court acknowledged that the continued viability of the catalyst theory remains an open question post-*Farrar*. *See Friends of the Earth, Inc. v. Laidlaw Envl. Servs, Inc.*, ___ U.S. ___, 120 S. Ct. 693, 711 (2000) (citing circuit decisions addressing the catalyst theory post-*Farrar*).[4] The Court declined to resolve the issue in *Friends*, explaining that since the district court had neither awarded nor denied attorneys' fees "[i]t would be premature . . . for us to address the continuing validity of the catalyst theory in the context of this case." *Id.* at 711-12. Even assuming the Court wished to address this question when next presented, a grant of certiorari in this case would not accomplish that goal: *Foreman*, like *Friends*, does not present the issue. *See id; see also New York v. O'Neill*, 359 U.S. 1, 8 (1959) (stating that issue on which state supreme court "expressly refrained from ruling" presented "a hypothetical question which need not now be considered"). As *Foreman* is an inappropriate vehicle for considering the validity of the catalyst theory post-*Farrar*, this Court should deny the petition.

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[4] Within *Friends'* collection of circuit cases, the Court cited *Foreman* and quoted dicta in which the Fifth Circuit expressed doubts about the catalyst theory. *Friends*, 120 S. Ct. at 711. The citation carried a "*cf.*" (i.e., "compare") signal to the Fourth Circuit's opinion in *S-1 & S-2*. *See id.* While dicta in *Foreman* did express doubts about the catalyst theory post-*Farrar*, the Fifth Circuit expressly declined to repudiate the catalyst theory. Instead, the court assumed the catalyst theory's validity and analyzed plaintiffs' evidence in light of traditional catalyst theory principles. *See* Pet. App. at 10a.

B. The record does not support Foreman's attempt to circumvent the absence of adversity by claiming that the Fifth Circuit's explicit application of the catalyst theory was, in reality, an implicit rejection of the doctrine.

Foreman attempts to sidestep the Fifth Circuit's assumption of the catalyst theory's continued viability by claiming that three elements of the court's reasoning make it impossible, as a practical matter, for Fifth Circuit litigants ever to prevail on a catalyst claim. Pet. at 14. None of Foreman's three rationales have any merit.

First, Foreman maintains that the district court's disallowance of relief based on receipt of a temporary restraining order eviscerates the catalyst theory, since in many cases a TRO encourages defendants to alter their conduct. Pet. at 15. Nothing in the Fifth Circuit's opinion, however, suggests that a plaintiff who is the beneficiary of a temporary restraining order cannot prevail *as a catalyst*. Indeed, neither the court of appeals nor the district court considered the temporary restraining order to be part of Foreman's catalyst claim. Instead, both assessed whether the temporary restraining order obtained by Foreman was equivalent to relief from an enforceable judgment. Pet. App. at 14a-15a, 38a-39a. Because the court of appeals' discussion of Foreman's temporary restraining order had nothing to do with the catalyst theory, the opinion will have no effect on the availability of that theory in other cases where plaintiffs argue that a temporary restraining order was a catalyst for obtaining non-judicial relief. That question was never addressed by the Fifth Circuit and is not properly before this Court.

Second, Foreman argues that the court of appeals was too strict in requiring him to show, as a condition of prevailing party status, that the relief he claims to have received was the same relief sought in the lawsuit. Pet. at 16-18. Foreman's argument is irrelevant, however, because the court of appeals "assume[d] that the plaintiffs did obtain some relief." Pet. App. at 12a. Despite that assumption, the Court still found that Foreman was not a catalyst, because "there is insufficient evidence of a causal connection between the plaintiffs' individual suit and the Texas legislature's decision to revamp the appointment procedure." *Id.* Foreman's argument suffers from the same problem that plagues his petition overall: the Fifth Circuit determined *as a matter of fact*, not law, that his lawsuit did not catalyze the legislature's action. Because Foreman was not a catalyst in fact, the catalyst legal issues he invites the Court to address are not presented.

Foreman also claims that he obtained sufficient relief to "prevail" because this Court's decision in the interlocutory appeal, *Foreman v. Dallas County*, 521 U.S. 979 (1997), represents success on the merits of his claim. Pet. at 17. The district court, relying on *Hewitt v. Helms*, 482 U.S. 755, 760 (1987), held otherwise and refused to award fees on that basis. Pet. App. at 40a. Foreman did not cross-appeal that ruling and thus has waived the issue. Because Foreman never challenged the district court's refusal to award fees on the basis of the 1997 interlocutory appeal in the Fifth Circuit, that issue cannot be raised in this Court. *See El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, ___, 119 S. Ct. 1430, 1434-36 (1999).

Third, Foreman claims that the court of appeals' failure to give conclusive effect to affidavits of individual legislators made it "impossible – as a matter of law – to demonstrate the motive of a legislature in passing a law that mooted a civil-rights suit. . . . " Pet. at 18. Foreman's complaint, though, is that the court of appeals applied the unexceptional and firmly established evidentiary principle that individual members of the legislature may not competently testify to the intent or motive of the entire legislative body. *See Bread Political Action Comm. v. Federal Elec. Comm.*, 455 U.S. 577, 582 n.3 (1982). That principle is eminently correct, because an individual legislator has no personal knowledge of the motive of the entire legislature, which in Texas consists of 181 members. If that were not the rule, courts would be in the position of deciding questions of statutory interpretation by relying on legislators' after-the-fact statements about the legislative body's motive or intent.

Foreman's claim that proof of causation will no longer be possible in cases involving a legislative remedy is hyperbole of the most extreme sort. Of course, there will be ways to prove causation in appropriate cases. Plaintiffs might rely on the chronology of events. The language of the statute might refer to the lawsuit or contain wording that comes from the suit. In some cases, the legislative record may reflect that the defendants, under the pressure of the lawsuit, came to the legislature and sought a change in the law. *See e.g., Institutionalized Juveniles v. Secretary of Pub. Welfare*, 758 F.2d 897, 917 (3rd Cir. 1985). There are countless other types of evidence that might point to a causal connection between the lawsuit and the passage of legislation.

In this case, the Fifth Circuit looked at all the evidence in the record, including the House Elections Committee Report showing that the committee was working – *prior to the filing of the lawsuit* – to introduce the legislation Foreman claims his suit catalyzed. The court concluded on the basis of this record that it was clear error to find a causal link between the lawsuit and the statutory change. The bottom line is that this case was decided on its facts, and the hypothetical legal issues Foreman invites this Court to consider are not presented for review.

C. Conspicuously absent from the petition is any mention of the novel *third-party* catalyst theory under which Foreman claims to have prevailed.

Foreman suggests that the Fifth Circuit, although purporting to apply catalyst theory standards, "overturned the fee award in a manner that will ensure that no plaintiff in the Fifth Circuit will ever succeed in obtaining fees on the basis of the catalyst theory." Pet. at 14. No such thing occurred. The Fifth Circuit faithfully applied established catalyst theory principles. The problem was that Foreman did not assert established catalyst theory grounds. Rather, Foreman claimed prevailing party status under an expansive, "third-party catalyst" theory that neither the Fifth Circuit, nor any other circuit, appears to have ever recognized.[5] Even if the legal issue of the

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[5] Although not cited to the Fifth Circuit, a Third Circuit opinion referenced in Foreman's Petition to this Court involves a catalyst claim premised on legislative action – albeit under very different circumstances. Pet. at 19 (citing *Institutionalized*

continued viability of the catalyst doctrine were presented in this case, the uniqueness and novelty of Foreman's third-party catalyst claim would make this an inappropriate vehicle for addressing general principles of catalyst doctrine.

Foreman did not, and could not, claim that Dallas County voluntarily provided relief under the pressure of the lawsuit, as contemplated in a traditional catalyst theory scenario. *See Hewitt v. Helms*, 482 U.S. 755, 761 (1987) (stating that plaintiffs could establish prevailing party status where a *defendant* voluntarily acting "under the pressure of the lawsuit" informally provides the relief sought). Instead, Foreman claimed that the lawsuit prompted a *third-party*, the Texas Legislature, to amend the Election Code in a manner that caused all 254 counties throughout Texas, including Dallas County, to adopt election judge appointment procedures that were favorable to petitioners. Not surprisingly, Foreman could provide the Fifth Circuit no authority to support his

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Juveniles v. Secretary of Pub. Welfare, 758 F.2d 897 (3d Cir. 1985)). Unlike *Foreman*, the Third Circuit case presented a situation in which a state agency defendant actively worked with the state legislature to achieve passage of legislation that provided plaintiffs relief; furthermore, plaintiffs' counsel drafted part of the legislation. *See* 758 F.2d at 917. Explicitly highlighting the unusual nature of these circumstances, the Third Circuit determined that the passage of legislation was fairly attributable to the state defendant, whose direct cooperation and involvement with the legislature provided relief. *Id.* The Third Circuit recognized, however, that the defendant's challenge to the notion of third-party-relief "is not unreasonable and may, in fact, preclude recovery of fees in some other context." *Id.*

proposed expansion of catalyst theory principles to encompass this sort of indirect, third-party relief.

The petition contains a lengthy, but immaterial, analysis of five pre-*Farrar* decisions that Foreman claims support a fee award in this case. Pet. at 22-25 (discussing *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989); *Rhodes v. Stewart*, 488 U.S. 1 (1988); *Hewitt*, 482 U.S. 755; *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Maher v. Gagne*, 448 U.S. 122 (1980)). Not one of these decisions even remotely contemplates a third-party catalyst situation. In fact, neither *Garland* nor *Rhodes* discusses the implications of non-judicial relief, since plaintiffs in both cases won favorable judgments. Finally, to the extent *Hewitt*, *Hensley*, and *Maher* consider non-judicial relief as a basis for determining prevailing party status, they do so solely with respect to relief provided by a *defendant* acting under pressure of the lawsuit. *See Hewitt*, 482 U.S. at 761; *Hensley*, 461 U.S. at 439 n.15; *Maher*, 448 U.S. at 129-30.

The defendant in this case was Dallas County, not the Texas Legislature or State of Texas. No state law or state action was challenged. No judgment could have been entered against the Legislature or the State, since neither was a party to the suit. In short, the Texas Legislature was under no pressure whatsoever from Foreman's lawsuit. As such, the facts of this case do not comport with the pre-*Farrar* decisions contemplating prevailing party status on the basis of voluntary actions taken by a defendant under pressure of the lawsuit. Nothing about the Fifth Circuit's opinion engaged, much less contravened, any of the pre-*Farrar* decisions cited in the Petition. The Court

should decline Foreman's invitation to render an advisory opinion concerning legal questions on which the Fifth Circuit never ruled.

Far from restricting, much less eviscerating, the catalyst theory, the Fifth Circuit assumed that even Foreman's novel third-party catalyst theory might succeed under appropriate facts.[6] The court determined, however, that the facts here did not prove that Foreman's lawsuit caused the third-party Texas Legislature to indirectly provide the relief sought in the lawsuit. *See* Pet. App. at 12a. ("[E]ven if we assume that the plaintiffs did obtain some relief, there is insufficient evidence of a causal connection between the plaintiffs' individual suit and the Texas legislature's decision to revamp the appointment procedure."). The Fifth Circuit's rejection of Foreman's unprecedented spin on the catalyst theory says nothing about the continued availability of traditional catalyst theory principles to prevailing parties who *do* obtain relief under pressure of the lawsuit. *See Hewitt*, 482 U.S. at 761. In fact, at least twice since *Farrar*, the Fifth Circuit has awarded fees to plaintiffs on a catalyst theory basis. *See Watkins v. Fordyce*, 7 F.3d 453 (5th Cir. 1993); *Pembroke*

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[6] The court noted that "it will be a rare case indeed where a defendant is made to pay attorney's fees for relief that was secured from an independent third-party who was never a party to the lawsuit." Pet. App. at 12a. Nonetheless, the court did consider plaintiffs' third-party catalyst claim, analyzing: first, whether plaintiffs had, in fact, obtained from the third-party Texas Legislature the relief sought in the lawsuit; and, second, whether the plaintiffs' lawsuit had caused the Texas Legislature to act as it did. *See id.* The court ultimately determined that plaintiffs failed to prove either of these two requisite elements under the catalyst theory. *See id.* at 12a-14a.

v. Wood County, 981 F.2d 225 (5th Cir. 1993). What *Foreman* demonstrates, if anything, is the Fifth Circuit's willingness to consider even new twists on the catalyst theory post-*Farrar*. On the facts of this case, however, the court was not persuaded to stretch the catalyst theory to encompass the type of indirect relief Foreman claimed he obtained from the third-party Texas Legislature, as opposed to the defendant, Dallas County.

At base, Foreman quibbles with the Fifth Circuit's view of the facts. Foreman has not identified any aspect of the Fifth Circuit's holding that causes or exacerbates a circuit conflict or in any way diminishes the availability of the catalyst theory to plaintiffs who informally obtain relief from the defendant – or, for that matter, a third party – who acts under pressure of the lawsuit. Foreman may wish to pique the Court's interest by bootstrapping intriguing questions of law onto the Fifth Circuit's explicitly fact-based opinion. The Court should not be misled: *Foreman* simply does not present these questions. Because the Fifth Circuit never held that the catalyst theory is a dead letter, nor that a third-party catalyst theory fails as a matter of law, these issues are not before the Court. It would be premature for the Court to address such hypothetical legal questions in the context of the Fifth Circuit's purely fact-oriented opinion. *Cf. Friends*, ___ U.S. ___, 120 S. Ct. at 711-12; *O'Neill*, 359 U.S. at 8.

II. The Facts of this Case Do Not Present the Second Question on Which Foreman Asks the Court to Grant Certiorari – Whether Plaintiffs in a Section 5, Voting Rights Act, Enforcement Action Prevail by Forcing Defendants to Replace an Unprecleared, Discriminatory Procedure with a Precleared, Non-Discriminatory One.

A. The record contains no determination that any procedure used by Dallas County in the appointment of election judges was either discriminatory or non-discriminatory.

As its second "question presented," Foreman asks if plaintiffs prevail in a section 5 enforcement action when they force defendants to replace a racially discriminatory voting procedure with a non-discriminatory procedure. This question, like others raised by Foreman, is not presented by the facts of this case.

No court ever determined that the procedure adopted by Dallas County in October 1996 and challenged by Foreman in this lawsuit was racially or ethnically discriminatory. Nor did any court determine that the procedure adopted in compliance with the 1997 legislation was non-discriminatory. This suit was an enforcement action under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Section 5 enforcement courts have extremely limited jurisdiction, and the issue of whether the voting procedure is, or is not, discriminatory is expressly foreclosed. *See Lopez v. Monterey County, Cal.*, 519 U.S. 9, 23 (1996); *Perkins v. Matthews*, 400 U.S. 379, 385 (1971). The district court here quite properly did not address that issue. Were this Court to grant Foreman's petition, there would be no lower court finding to review

for purposes of answering the question Foreman poses. Any opinion this Court might issue would be an advisory opinion on a hypothetical set of facts.

B. As this Court previously found, the record in this case is insufficient to establish whether the October 1996 procedure required preclearance.

Foreman's second question implicitly and improperly assumes that Dallas County's October 1996 election procedure required preclearance. However, preclearance would be required only if Dallas County's October 1996 practice differed from the one in effect on November 1, 1972. *See Foreman v. Dallas County*, 521 U.S. 979, 980-81 (1997); Pet. App. at 32a. This Court has already determined that "the record is silent as to the procedure used by Dallas County for appointing election judges as of November 1, 1972, [and thus] we cannot make a final determination here as to whether preclearance is in fact required." *Id.* 521 U.S. at 981; Pet App. at 33a. On remand, the case was dismissed, primarily on grounds of mootness; thus, no finding was made on that question. *See Foreman*, 990 F. Supp. at 509 n.10. There has never been a factual determination whether the October 1996 election procedure was the same as the procedure in effect on November 1, 1972.

Absent a determination that preclearance was, in fact, required, there is no ruling in this case that permits the Court to address Foreman's second "question presented." The hypothetical issue of whether a section 5 plaintiff who forces a defendant to replace a procedure that required, but never obtained, preclearance with a

precleared procedure is not presented on the facts of Foreman's case. The Court should deny the petition. *See New York v. O'Neill*, 359 U.S. 1, 8 (1959).

CONCLUSION

For these reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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